

ATTORNEY GENERAL'S OPEN RECORDS AND MEETINGS OPINION
No. 98-O-05

DATE ISSUED: March 3, 1998

ISSUED TO: Paul Ebeltoft, President, North Dakota Board of
Higher Education

CITIZENS' REQUESTS FOR OPINIONS

On February 20, 1998, this office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Mr. Tim Fought, on behalf of the Bismarck Tribune, asking whether the North Dakota Board of Higher Education (Board) violated N.D.C.C. §§ 44-04-19 and 44-04-20 when four board members met with University of North Dakota President Kendall Baker on Thursday, February 19, 1998, without giving public notice of the meeting. Also on February 20, 1998, this office received a similar request from Mr. Al Aamodt, on behalf of WDAY alleging that the Board met without public notice in a series of smaller gatherings in advance of the statement and response submitted during the Board meeting on February 19. On February 23, this office received a third opinion request from Mr. Jack McDonald, on behalf of The Forum, the North Dakota Newspaper Association and the North Dakota Broadcasters Association, alleging similar violations and further alleging that four Board members met on February 10 in Fargo, that two Board members met with Dr. Baker on January 20 pursuant to authority delegated by the Board but without prior public notice of the meeting, and that the Board failed to comply with the procedures for executive sessions in N.D.C.C. § 44-04-19.2. On February 24, this office received a request from Mr. Terry Devine, on behalf of The Forum, alleging similar violations.

FACTS PRESENTED

As a result of an audit report regarding accounting practices at UND, increased public attention has been brought to the job performance of Dr. Baker. On January 20, 1998, Board President Paul Ebeltoft and Vice President Joe Peltier met with UND President Baker on the issues raised in the audit.

On February 10, four Board members (Paul Ebeltoft, Cynthia Kaldor, Craig Caspers, and Shane Waslaski) met in Fargo for dinner. Chancellor Larry Isaak and Faculty Representative Kay Fulp were also

present. Draft minutes of the gathering indicate the Board members "discussed options for scheduling discussion of and a Board response to the UND deficits and accounting practices, including a proposal presented by Mr. Ebeltoft that UND President Baker make a statement." No formal action was taken at the gathering. An e-mail message from Mr. Ebeltoft after the meeting indicates the meeting took roughly three hours. Following the meeting, Mr. Ebeltoft telephoned the other Board members to discuss what had occurred at the dinner meeting, although he was unable to reach Board Member Clayburgh.

On February 19, the other four voting Board members (Joe Peltier, Jack Hoeven, Jeanette Satrom, and Bev Clayburgh) met with Dr. Baker prior to the scheduled Board meeting. According to draft minutes of the gathering, the Board members indicated to Dr. Baker that the UND deficits and accounting practices were serious matters and that Dr. Baker's initial response to the disclosures was unacceptable. No formal action was taken at the meeting.

The Board admits there were an unknown number of telephone conversations and one or more in-person gatherings among Board members regarding Dr. Baker's job performance in the thirty days leading up to the date this office received the first opinion request regarding the Board. The Board has provided this office with sixty-eight pages of e-mail messages of the Board involving Dr. Baker. It appears that many of these conversations were initiated by Mr. Ebeltoft, who has explained that the purpose of these conversations was to develop the agenda for the regular monthly Board meetings in January and February.

No notice was prepared, filed, or posted for the gatherings described in this opinion. Draft minutes were prepared for the February 10 and 19 meetings after the opinion requests were received alleging that the gatherings were "meetings" required to be open to the public under the open meetings law. No minutes or notes are available of the telephone conversations and smaller in-person gatherings, although subsequent e-mail messages partially reveal the substance of the conversations.

ISSUES

1. Whether the gathering of four Board members on February 10, 1998, to discuss Dr. Baker's job performance was a "meeting" of the Board as defined in N.D.C.C. § 44-04-17.1(8).

2. Whether the discussion of four Board members with Dr. Baker on February 19, 1998, was a "meeting" of the Board.
3. Whether a series of smaller gatherings collectively involving four or more Board members held since January 20, 1998, were held to avoid the requirements of the open meetings law.
4. Whether sufficient public notice was prepared, posted, and filed for the Board meetings discussed in Issues One through Three.
5. Whether the procedures in N.D.C.C. § 44-04-19.2 were followed for any executive session of the Board during the meetings discussed in Issues One, Two, and Three.

ANALYSES

Issue One:

N.D.C.C. § 44-04-17.1(8)(a) defines the term "meeting" as used in the open meetings law:

"Meeting" means a formal or informal gathering, whether in person or through other means such as telephone or video conference, of:

- (1) A quorum of the members of the governing body of a public entity regarding public business; or
- (2) Less than a quorum of the members of the governing body of a public entity regarding public business, if the members attending one or more of such smaller gatherings collectively constitute a quorum and if the members hold the gathering for the purpose of avoiding the requirements of section 44-04-19.

This definition has four main elements:

1. Public entity
2. Governing body
3. Public business
4. Gathering of a quorum of the members

Issue One focuses on elements three and four: whether the "meeting" of four Board members on February 10 involved a quorum of the Board members and regarded public business.¹

The Board has eight voting members. N.D. Const. art. VIII, § 6. As used in the definition of "meeting", quorum means "one-half or more of the members of the governing body, or any smaller number if sufficient for a governing body to transact business on behalf of the public entity." N.D.C.C. § 44-04-17.1(14). Therefore, four members of the Board are a "quorum" for purposes of the open meetings law.²

Not every gathering of four or more Board members is a "meeting." "Meeting" . . . does not include chance or social gatherings where public business is not considered" N.D.C.C. § 44-04-17.1(8)(b). However, as this definition indicates, if the topic of conversation involves the Board's "public business," the gathering is a "meeting," even if dinner or lunch is served during the meeting.³

¹ As a state agency, the North Dakota University System is a "public entity." See N.D.C.C. § 44-04-17.1(12)(a). Under N.D. Constitution Article VIII, Section 6 and N.D.C.C. § 15-10-01, the Board is the multimember body responsible for making a collective decision on behalf of the University System, and is therefore a "governing body." See N.D.C.C. § 44-04-17.1(6).

² Although four of the eight Board members may not be a quorum for purposes of conducting business of behalf of the Board, N.D.C.C. § 15-10-07, any four members could effectively block any Board action. This potential for four Board members to control the Board's actions makes significant the broader definition of "quorum" in N.D.C.C. § 44-04-17.1(14).

³ The e-mail messages provided to this office indicate that at least since January 20, the "dinner meeting" was not intended to be solely a social gathering, but instead was a planned opportunity, along with a similar meeting scheduled for February 16, for four board members to discuss Mr. Baker's job performance. See January 21, 1998, e-mail from Paul Ebeltoft ("[W]e would then use our dinner meetings . . . to discuss these things face-to-face. . . . I intend to have the face-to-face small group meetings as presently scheduled."). As one message states:

The current plan is to proceed with the dinners that had been scheduled long ago with small groups of Board members. If it looks like something good will result, I will also schedule conference calls with up to 4 members at a time to discuss all this.

"Public business" means all matters that relate or may foreseeably relate in any way to:

- a. The performance of the public entity's governmental functions, including any matter over which the public entity has supervision, control, jurisdiction, or advisory power; or
- b. The public entity's use of public funds.

N.D.C.C. § 44-04-17.1(11).

The Board is responsible for supervising presidents of institutions in the University System, although that function has been delegated by Board policy to the chancellor. As a result, any discussion of Dr. Baker's job performance would pertain to the public business of the Board. It is my opinion that the gathering of four Board members on February 10 was a "meeting" of the Board, required to be open to the public and preceded by sufficient public notice.

Issue Two:

During a tour of the North Dakota State College of Science at Wahpeton (NDSCS) on February 19, 1998, the four Board members who did not attend the February 10 dinner meeting held a brief meeting with Dr. Baker.⁴ As discussed above in Issue One, a gathering of four or more Board members to discuss Dr. Baker's job performance would involve a quorum and pertain to the Board's public business.

February 3, 1998, e-mail from Paul Ebeltoft (emphasis added).

⁴ It is unclear, and irrelevant to this opinion, whether it was by coincidence or design that the four members who met with Mr. Baker on February 19 were the members who did not attend the dinner meeting on February 10. The Board contends the meeting was unscheduled, but the e-mail messages mentioned in footnote three strongly suggest this was a planned discussion. In addition, an e-mail from Mr. Ebeltoft on February 11 and from Chancellor Isaak the same day suggested that Board Member Hoeven and a few other board members get together, and a meeting involving the same four members was scheduled for February 16 "in a small town" but was canceled, possibly because one of the board members could not attend. See February 15, 1998, e-mail from Bev Clayburgh. Further, Mr. Isaak was requested on the morning of February 19 to tell Mr. Baker to be at the NDSCS President's office at 11:00 that morning to meet with some Board members.

Therefore, it is my opinion that the gathering on February 19 was also a "meeting" of the Board.

Issue Three:

The definition of "meeting" includes not only simultaneous gatherings of a quorum of the members of a governing body, but also a series of smaller gatherings collectively involving a quorum if the members hold the gatherings for the purpose of avoiding the open meetings law. N.D.C.C. § 44-04-17.1(8)(a)(2). The Board has admitted that all Board members participated in one or more telephone calls or in-person meetings, both before and after January 20, 1998, regarding Dr. Baker's job performance.

There are two things to consider under the definition of "meeting" in N.D.C.C. § 44-04-17.1(8)(a) when looking at the interaction of individual members of a governing body: the number of members involved and the topic of discussion. First, a quorum of the members must participate, either in person or collectively through a series of smaller gatherings. By adopting the "quorum rule," the Legislature impliedly exempted from the open meetings law most conversations between two or three of the eight Board members.⁵ Individual Board members are generally not prohibited from gathering information on their own or from talking to another Board member, even regarding public business. However, there is a threshold at which multiple conversations (in person or over the telephone) on a particular subject, each involving two or three Board members, collectively involve enough Board members (a quorum) that the conversations have the potential effect of forming consensus or furthering the Board's decision-making process on that subject. At the point the conversations on a particular subject collectively

⁵ Conversations of two or three of the Board members would not constitute a meeting unless those members have been delegated authority to act as a group on behalf of the Board and therefore fall within the definition of "governing body" in N.D.C.C. § 44-04-17.1(6). For example, although the opinion request regarding the January 20, 1998, meeting was not submitted within thirty days after the alleged violation as required in N.D.C.C. § 44-04-21.1, the e-mail received by this office indicate that the President and Vice President of the Board had been informally delegated authority to meet with Mr. Baker on behalf of the entire Board. See, e.g., January 18, 1998, e-mail from Paul Ebeltoft.

involve a quorum of the Board, the "quorum rule" is satisfied and the topic of discussion must be considered.⁶

Second, not every gathering or series of smaller gatherings collectively involving a "quorum" is a "meeting" required to be open under N.D.C.C. § 44-04-19. As the definition of "meeting" indicates, the discussion must pertain to "public business" and does not include social or chance gatherings as long as public business is not considered. N.D.C.C. § 44-04-17.1(8)(a). The open meetings law does not require members of governing bodies to sacrifice personal friendships, and Board members are free to meet socially, even as a group. Furthermore, it is appropriate for a member who was absent from a meeting to contact the other members, if the conversations are limited to finding out what happened at the meeting. See Letter from Attorney General Allen Olson to Myron Atkinson (March 5, 1976). Similarly, it would be appropriate for the presiding officer of a governing body to contact the other members to determine which items to include on the agenda of the next meeting, as long as the conversations do not include information-gathering or discussion regarding the substance of the issues on the agenda. It is only when those meetings become steps in the decision-making process (information gathering, discussion, formulating or narrowing of options, or action) regarding public business that the open meetings law is triggered.

Opinions under N.D.C.C. § 44-04-21.1 are issued according to the facts provided by the public entity. In response to an inquiry from this office regarding the opinion requests, the Board indicated there were an unknown number of telephone calls or in-person meetings involving two, and sometimes three, Board members regarding Dr. Baker's job performance. It is not practical or possible to identify all the telephone conversations between Board members in the last month regarding Dr. Baker's job performance, but a few things are clear. First, the conversations went beyond simply identifying agenda items for Board meetings. Rather, they involved the course of action the Board should take in response to the UND audit, including possible options and appropriate timelines. Second, the telephone conversations and in-person gatherings collectively involved four or

⁶ The open meetings law applies to all stages of the decision-making process, not just a meeting at which action is taken on behalf of the Board. See Peters v. Bowman Public School Dist., 231 N.W.2d 817 (N.D. 1975); 1996 N.D. Op. Att'y Gen. 38; Letter from Attorney General Allen Olson to Myron Atkinson (March 5, 1976).

more Board members.⁷ Third, a statement by Dr. Baker and a response by the Board were screened, edited, and approved by the Board members through a combination of e-mail and telephone conversations.⁸

Legal counsel for the University System has argued that Mr. Ebeltoft merely consulted with the Board members on whether to include a discussion of Dr. Baker on the agenda of the meeting. For a series of smaller gatherings to be a "meeting," the gatherings must be held "for the purpose of avoiding the requirements of section 44-04-19," N.D.C.C. § 44-04-17.1(8)(a)(2), and the Board denies it intended to violate the open meetings law. However, intent to violate the law is not required; what is required is that the Board intentionally met in groups smaller than a quorum, yet collectively involving a quorum, and intentionally discussed or received information regarding items of public business that would have had to occur in an open meeting if any of the gatherings had been attended by a quorum of the Board.

Representatives of the Board state that the Board's intent was to reach consensus on "the most appropriate agenda item."⁹ This intent necessarily includes substantive discussion among the Board members to identify the Board's options and to attempt to reach consensus on which option the Board should use. The facts presented indicate, and the Board agrees, that much more occurred during the telephone conversations in the last month than simply scheduling future

⁷ Representatives of the Board acknowledged to this office that the Board intentionally met in groups of less than five, which the Board mistakenly thought was a quorum under the open meetings laws. This admission is consistent with several e-mail messages from Mr. Ebeltoft or Chancellor Isaak suggesting meetings of one Board member and "a couple" others or "up to four" Board members. These references indicate that the Board was well aware of the consequences of having a meeting involving a quorum.

⁸ The numerous e-mail messages provided to this office, although relevant, do not constitute a "meeting." Unlike telephone conversations, e-mail messages or letters between Board members are records subject to the open records and records retention laws, but are not a "gathering" of Board members. However, although the issue has not been raised in the opinion requests, this office is troubled by the straw-votes conducted by e-mail in light of the open voting requirements in N.D.C.C. § 44-04-21(1).

⁹ In fact, the Board ultimately decided that no agenda item was necessary. Mr. Baker read a statement and Mr. Ebeltoft read the Board's response under the standard agenda topic "Board President's Report."

meetings or identifying agenda items. Whichever agenda item was agreed on during these conversations would simply be the means of implementing the course of action agreed on by the Board in these conversations. By the time of the official Board meeting on February 19, sufficient substantive discussion had taken place among the Board members that the Board's course of action, or inaction, at the meeting in response to public concern regarding Dr. Baker's job performance was in effect a "done deal."

In conclusion, the Board acknowledges it intentionally met in smaller groups collectively involving a quorum and engaged in discussions that would have had to occur in an open meeting if done in a gathering attended by a quorum of the Board members. Therefore, although the number of violations is difficult to determine, it is my opinion that the series of telephone conversations and in-person gatherings held from January 20 through February 19 collectively involved a quorum, were held to avoid the open meetings law, and were therefore "meetings" required to be open to the public and preceded by public notice.

Issue Four:

Numerous Board "meetings" have been identified in Issues One through Three of this opinion. The Board admits that no notice was prepared for any of these meetings as required in N.D.C.C. § 44-04-20. Public notice must be posted and filed at the same time the Board members are notified of a meeting. N.D.C.C. § 44-04-20(5). As discussed in greater detail in footnotes three and four, the Board members were aware of some of the meetings discussed in Issues One through Three at least three weeks prior to the meetings. A meeting the public does not know about has the same effect as a closed meeting. Therefore, it is my opinion that the Board violated N.D.C.C. § 44-04-20 each time it held a meeting described in Issues One through Three.

Issue Five:

The final issue is whether the procedures in N.D.C.C. § 44-04-19.2 were followed for any executive session of the Board under N.D.C.C. § 15-10-17(1). A governing body's discussion and evaluation of a public employee's job performance in an open meeting may be personally painful, but reviewing the performance of government responsibilities and use of public funds by a public employee are nevertheless important items of public business. Thus, as a general

rule, there is no statutory exception from the open meetings law for personnel matters.

However, the Legislature has adopted a limited exception for consideration of the removal of a president, faculty head, professor, instructor, teacher, officer, or other employee of an institution in the University System. N.D.C.C. § 15-10-17(1). This exception is narrow and does not apply to all discussions of a president's job performance or to consideration of personnel actions short of termination. 1981 N.D. Op. Att'y Gen. 118, 119. "Under this section, the issue of appointment or removal is what must be centrally considered during any executive session, not just a president's general performance." Id. (Emphasis added).

The e-mail messages and draft minutes suggest that portions of the meetings described in Issues One through Three could have been held in executive session under N.D.C.C. § 15-10-17(1). However, much of these meetings were general reviews of Dr. Baker's job performance that could not be held in executive session. In addition, to properly hold an executive session under N.D.C.C. § 15-10-17(1), the Board would have to comply with the procedures in N.D.C.C. § 44-04-19.2. These procedures include convening in an open meeting preceded by sufficient public notice, announcing the legal authority for the executive session, recording the executive session, and taking any action in an open meeting. The Board did not follow these procedures and has indicated it is not relying on N.D.C.C. § 15-10-17(1) as authority for closing any of the meetings described in Issues One through Three. Therefore, because the Board is not claiming that it held any executive sessions authorized by state statute, it is my opinion that the Board was not required to comply with the procedures in N.D.C.C. § 44-04-19.2.

CONCLUSIONS

1. It is my opinion that the meeting of four Board members on February 10, 1998, was a "meeting" of the Board under the open meetings law.
2. It is my opinion that the meeting of four Board members on February 19, 1998, was a "meeting" of the Board under the open meetings law.
3. It is my opinion that the series of smaller gatherings collectively involving a quorum of the Board members held since

January 20, 1998, were held to avoid the open meetings law, and were therefore "meetings" required to be open to the public and preceded by public notice.

4. It is my opinion that the Board violated N.D.C.C. § 44-04-20 when it failed to provide public notice of the meetings held on February 10 and February 19, 1998, and of the series of telephone conversations and in-person gatherings described in Issue Three.
5. It is my opinion that the Board was not required to follow the procedures in N.D.C.C. § 44-04-19.2 because it did not hold an executive session under N.D.C.C. § 15-10-17(1) during the meetings discussed in Issues One through Three.

STEPS NEEDED TO REMEDY VIOLATIONS

The purpose of the open meetings and notices laws is to give the public the ability to see how government decisions are made and how public funds are spent. Both interests are implicated by the recent audit of UND, yet, because of the Board's failure to provide public notice of the meetings described in Issues One through Three, the public was unable to hear the Board members' discussion or their comments to Dr. Baker regarding his job performance. Since no formal Board action was taken, the discussion and comments were the only response by the Board to questions regarding Dr. Baker's job performance other than the prepared remarks submitted on February 19. As a result, the public has been deprived of the accountability that is served by having group decisions regarding public business discussed and made in the open.

The failure to give notice of these meetings cannot be completely remedied; no recording was made and any notes of the meetings are incomplete at best. To remedy the violations described in this opinion as much as possible, the Board must convene an open meeting, preceded by sufficient public notice, to recreate the discussion that occurred at those meetings. The meeting should be attended by all Board members (either in person or by conference call). During the meeting, each Board member must describe, to the best of his or her recollection, the discussion and opinion each member expressed during the meetings described in Issues One through Three regarding Dr. Baker, his job performance, and any action to be taken or recommended by the Board. In addition, to compensate for the frailty of human memory, the Board members must respond to questions from the public,

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including the media, regarding their conversations with each other and with Dr. Baker. However, the Board members do not need to respond to questions on what they were thinking or at what point they came to a conclusion on the preferred option for handling the situation with Dr. Baker. The Board should hold the meeting within a reasonable time and prepare, post, and file the notice of the meeting within seven days of the date of this opinion.

Prior to holding the meeting described above, the Board should disclose draft minutes of the meetings (which it already has prepared for the February 10 and 19 meetings), notes of the meetings, and any records discussing the Board members' conversations regarding Dr. Baker since January 20.

To assist in future compliance with the open records and meetings laws, this office is available to provide a training session for the Board and its staff.

Failure to disclose a record, issue a notice of a meeting, or take other corrective measures within seven days of the date an opinion is issued under N.D.C.C. § 44-04-21.1 will result in mandatory costs, disbursements, and reasonable attorney fees if the person requesting the opinion prevails in a civil action under N.D.C.C. § 44-04-21.2. N.D.C.C. § 44-04-21.1(2). It may also result in personal liability for the person or persons responsible for the noncompliance. Id.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

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